

## **THRESHOLD ANALYSIS**

### **RURAL/NONRURAL REVIEW REQUEST FOR RECONSIDERATION RFR07-05**

#### **ISSUE**

The Ketchikan Indian Community (KIC) submitted a request dated July 6, 2007 (**Appendix A**) that the Federal Subsistence Board (Board) reconsider its actions regarding subsistence management regulations for public lands in Alaska published as a final rule on May 7, 2007 (72 Fed. Reg. 25688-25697). The Board took final action on this matter at a public meeting December 12-13, 2006, in Anchorage. The request was received within the time required by Federal subsistence regulations.

The KIC specifically notes that this published rule maintains a nonrural determination for the Ketchikan area, while simultaneously aggregating Saxman into the Ketchikan nonrural area. KIC's request for reconsideration (RFR) says the Board's selection of information, interpretation of information, applicable laws or regulation is in error or contrary to existing law. Further, it says new information is now available regarding economic conditions in Ketchikan, which it urges the Board to review.

#### **BACKGROUND**

##### **Regulatory History**

Federal subsistence regulations at 36 CFR 242.15 and 50 CFR 100.15 describe procedures for the Board to make and review rural/nonrural determinations. Those regulations stipulate that rural determinations shall be reviewed on a 10-year cycle, commencing with the publication of the year 2000 census. OSM (2006a) provides a summary of relevant regulations and describes the process undertaken to comply with the requirement to conduct the decennial review.

##### **Existing Federal Regulations**

Existing rural/nonrural determinations, following the final rule published May 7, 2007, are described in Federal subsistence regulations at 36 CFR 242.23 and 50 CFR 100.23. OSM (2006a) provides a description of rural/nonrural determinations that had been in place prior to the completion of the decennial review.

##### **Regulatory Language Regarding Requests for Reconsideration**

The applicable regulatory language associated with requests for reconsideration can be found in **Appendix B**.

#### **PRELIMINARY ASSESSMENT OF REQUESTER'S CLAIMS**

The Board uses three criteria to evaluate a request for reconsideration.

## **Criterion 1. Information previously not considered by the Board.**

### Claim 1.1

The Board's interpretation of information and data is in error. When determining the nature of Ketchikan, the Board erred by failing to consider all of the new and relevant information presented since the last ANILCA classifications. The following five information categories are addressed in the claim: use of fish and wildlife, development and diversity of the economy, transportation, community infrastructure, and educational institutions.

#### *Preliminary assessment of claim 1.1*

The information categories noted by the KIC in this claim are the characteristics in Federal subsistence regulations which may be used when making rural and nonrural determinations. In addition, the regulations state that characteristics used are not limited to those listed. This regulatory construction provides substantial latitude to the Board in the type of community characteristics used to evaluate rural or nonrural status. All of the five listed characteristics were addressed with historical and current data for one or more indicators in the June 2006 staff analysis report to the Board (OSM 2006a). Characteristics were evaluated by the Board for communities using the data that was available. This included household subsistence harvest and use survey data for Ketchikan collected for this purpose by the Ketchikan Indian Community in 2006 under a grant from the Bureau of Indian Affairs.

Federal subsistence regulations do not have specific quantitative thresholds for community characteristics or a requirement for a certain portion to be of a particular type. Rather, whether the characteristics of a community or area are indicative of rural or nonrural status is a collective assessment that, in the end, rests on Board evaluation and judgment. In the case of the Ketchikan Area, the Board weighed the information presented in the analysis as well as extensive public and written comments and Regional Council recommendations and did not find that the characteristics of the Ketchikan Area had changed significantly to warrant changing the existing nonrural status.

In summary, no new relevant information is presented by the requester that was not considered by the Board. Consequently, there does not appear to be merit to this claim.

## **Criterion 2. The existing information used by the Board is incorrect.**

### Claim 2.1

The Board improperly relied on population figures when making its determination.

#### *Preliminary assessment of claim 2.1*

Even though the Board uses a population threshold, it recognizes that population alone is not the sole indicator of a rural or nonrural community. This flexibility is consistent with approaches other Federal agencies have used to determine if communities are rural. ANILCA did not define the term rural. However, the Congressional Record identified several examples of nonrural places in Alaska, including Ketchikan. Whether the regulations should describe a threshold of 11,000 derived from the Ketchikan Area as a whole, or 7,000 derived only from the City of Ketchikan, has no effect on the outcome of this decennial review, as is further explained here. Existing population levels identified in regulation provide for a presumption unless a community or area exhibits characteristics contrary to the initial presumption. This provides the Board latitude to deviate from the presumption thresholds as warranted after review of additional community characteristics. Communities and areas of all sizes were given adequate consideration, and multiple opportunities were provided for review and comment by Subsistence

Regional Advisory Councils, the State of Alaska, and the public. None of the communities or areas (as defined by grouping in the course of this review) proposed by the Board for change in status was in the population range of 7,000 to 11,000.

There does not appear to be merit to this claim.

**Criterion 3. The Board’s interpretation of information, applicable law, or regulation is in error or contrary to existing law.**

Claim 3.1

Title VIII of ANILCA is Indian legislation and remedial legislation, subject to canons giving broad interpretation to its mandate. The Board interprets Title VIII of ANILCA narrowly, illegally restricting KIC’s access to subsistence resources.

*Preliminary assessment of claim 3.1*

The canon of Indian law referred to by the requester is that “statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians.” *Bryan v. Itasca County*, 426 U.S. 373, 392 (1987). There is no disputing that Title VIII of ANILCA was initially drafted for the benefit of Alaska Natives. However, there is also no disputing that Congress intentionally modified the draft bill such that the law actually passed is, by the express language of its terms, for the benefit of rural Alaskans. In such a case, the intent of Congress is not found in the legislative history, but in the plain language of the statute. There is nothing “doubtful” about the language of Title VIII – the law, as passed by Congress, plainly benefits all rural Alaskans rather than only Alaska Natives. *See Hoonah Indian Association v. Morrison*, 170 F.3d 1223, 1228-9. (9<sup>th</sup> Cir. 1999) (“Congress expressly rejected the proposition that the subsistence provision was only for Natives.”). *See also 70 FR 76400, 76402 (Dec. 27, 2005)* (“The priority in Title VIII is for rural residents regardless of whether or not they are Alaska Natives, and Alaska Natives who are urban residents do not enjoy the priority.”) Consequently, the Board did not err in its interpretation of the scope of Title VIII or its application thereof.

There does not appear to be merit to this claim.

Claim 3.2

The Board failed to accord deference to the recommendations of the Southeast Regional Advisory Council and failed to provide written findings to the Council in a timely fashion.

*Preliminary assessment of claim 3.2*

Section 805(c) of ANILCA requires the Board to “consider the report and recommendations of the regional advisory councils concerning the taking of fish and wildlife on the public lands within their respective regions for subsistence uses.” Congress could have simply required the Board to “consider the report and recommendations of the regional advisory councils” and ended the first sentence of section 805(c) at that point. But it chose not to do so, instead conditioning the sentence with the phrase “concerning the taking of fish and wildlife on the public lands . . .” The canon of statutory construction requires that the phrase not be ignored, for to do so would be to render it meaningless.

The Departments of the Interior and Agriculture interpret the phrase “concerning the taking of fish and wildlife on the public lands...” to constrain deference to those types of Board actions that *directly* affect the taking of fish and wildlife, such as setting season dates, establishing harvest limits, and determining permissible methods and means.<sup>1</sup> Board actions that have only an *indirect* effect on the taking of fish and wildlife, such as decisions concerning who is or is not eligible under Title VIII for the subsistence priority, are not subject to deference. In accordance with this interpretation, a Council recommendation concerning the rural or nonrural nature of a community is not entitled to deference by the Board.<sup>2</sup>

It should be noted that the question concerning the appropriate scope of deference to regional advisory council recommendations under Section 805(c) has been raised in connection with litigation presently before the Ninth Circuit Court of Appeals. *State of Alaska v. Fleagle et al. and Cheesh-Na Tribal Council*, No. 07-35723 (9<sup>th</sup> Cir.). The Court’s decision may eventually impact how the Departments interpret section 805(c) and its implementing regulations, but in the meantime, the Departments are obligated to follow the law in accordance with its interpretation as described above.

With regard to the issue of written findings, we acknowledge that our regulations at 100.18(a)(4) state that the Board shall provide a written explanation. However, if, in a particular instance, the Board fails to do so, such an administrative oversight does not negate the validity of the rulemaking action.

There does not appear to be merit to this claim.

### Claim 3.3

The Board actions were arbitrary and capricious as the application of the rural criteria is not being uniformly applied to communities across Alaska. Requester believes a comparison between the Board’s actions in relation to Ketchikan and Kodiak best demonstrates the concern.

#### *Preliminary assessment of claim 3.3*

The decennial review of rural/nonrural determinations was conducted with an emphasis on what has changed, but allowed for other considerations. In testimony at hearings and in recommendations and comments, perspectives were provided on the degree of change that has occurred in various communities and areas. OSM (2006a) presented tables and graphs providing historical and current population data and indicators for all five community characteristics identified in regulation. Ultimately, whether changes in communities and areas, or other considerations, warranted regulatory action, rested with the judgment of the Board.

The final rule (72 FR 25695) noted relative to Kodiak that “Based on the marginal population growth since 1988 (1.3 percent), the high cost of food, remoteness, and the high use of subsistence resources, no change will be made to Kodiak’s rural determination.”

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<sup>1</sup> This interpretation is based in part on the meaning of “take,” which is defined in ANILCA section 102 to mean “to pursue, hunt, shoot, trap, net, capture, collect, kill, harm, or attempt to engage in any such conduct.” Because this is a statutory definition, we can neither add to nor subtract from it in any way.

<sup>2</sup> The U.S. District Court for the District of Alaska addressed this issue in *Safari Club Int’l. v. Demientieff* (No. 3:98-cv-0414-HRH). In that case, the Court found that because a proposed rule on Council composition did not concern the “taking of fish and wildlife on public lands,” the Secretaries were under no statutory obligation to submit the rule to the Councils for their review or comment. *Amended Order on Motion for Summary Judgment* (Docket Entry 299, filed Aug. 8, 2006), at 13-14.

The final rule (72 FR 25695) also reported that Ketchikan would retain its nonrural status, noting that “Ketchikan possesses many nonrural characteristics, including having a 2-year college, a large national retailer, car dealerships, fast food restaurants, and roads linking the outlying surrounding area to the city. Ferry service is more dependable with greater frequency of service than in most other locations in Alaska. Although the pulp mill closed, there is still diversity in the economy, with tourism, fishing, fish processing, timber, dry docking services, retail services, and government providing the majority of employment. There is a hospital and a high diversity of services offered. The Ketchikan Area had the sixth highest population in the state in 2005, considering community groupings as defined by the Board. All other areas with higher populations are currently considered nonrural in Federal subsistence regulations. Three areas with smaller populations are currently classified as nonrural and are not being changed in status: the Homer Area, Seward Area, and Valdez. Harvest of subsistence resources in the Ketchikan Area is lower than is characteristic of rural communities.”

There does not appear to be merit to this claim.

## **SUMMARY**

The Ketchikan Indian Community submitted a request that the Federal Subsistence Board reconsider its actions regarding rural and nonrural determinations. KIC specifically notes that the published rule maintains a nonrural determination for the Ketchikan area, while simultaneously aggregating Saxman into the Ketchikan nonrural area. The Board took final action on this matter at a public meeting December 12-13, 2006, in Anchorage. The request was received within the time required by Federal subsistence regulations. The request says that the Board’s selection of information, interpretation of information, applicable law and regulation was in error or contrary to existing law. Further, it says new information is now available regarding economic conditions in Ketchikan which it urges the Board to review.

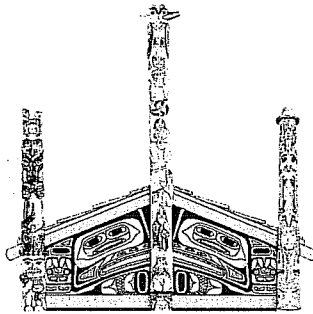
The KIC’s RFR made five claims, one of which was categorized in this threshold analysis under criterion 1 (information previously not considered by the Board), one of which was categorized under criterion 2 (the existing information used by the Board is incorrect), and three of which were categorized under criterion 3 (the Board’s interpretation of information, applicable law, or regulation is in error or contrary to existing law). This threshold analysis finds that there does not appear to be merit to any of these five claims.

## **LITERATURE CITED**

OSM (Office of Subsistence Management). 2006a. Rural determinations decennial review: Analysis of communities and areas as assigned by the Federal Subsistence Board. June 23, 2006. FWS, Office of Subsistence Management. Anchorage, AK.

OSM (Office of Subsistence Management). 2006b. Rural determinations decennial review: Summary of Council recommendations and public comments on the August 2006 proposed rule and considerations in response. November 27, 2006. FWS, Office of Subsistence Management. Anchorage, AK.

**APPENDIX A:** Rural/nonrural review request for reconsideration RFR07-05.



# *Ketchikan Indian Community*

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### **Request for Reconsideration of the Federal Subsistence Board's Decision to Classify the Ketchikan Area as Non-Rural 72 Fed. Reg. 25688 (May 7, 2007)**

#### **I. INTRODUCTION**

The Federal Subsistence Board (hereinafter 'the Board') published its final rule regarding subsistence management regulations for public lands in Alaska on May 7, 2007. 72 Fed. Reg. 25688-25697 (May 7, 2007). This published rule maintains a 'nonrural' determination for the Ketchikan area, while simultaneously aggregating Saxman into the Ketchikan nonrural area. 72 Fed. Reg. 25697 (May 7, 2007).

Any aggrieved person may file a request for reconsideration with the Board within sixty (60) days of the date of publication. 50 CFR § 100.20 (2006). Comes now:

Richard Jackson, President and Merle N. Hawkins, Secretary  
(for, and on behalf of)  
Ketchikan Indian Community Tribal Council  
2960 Tongass Avenue  
Ketchikan, AK 99901

And hereby files this timely Request for Reconsideration (RFR) of the above-cited regulation determining the Ketchikan Area as nonrural for purposes of the federal subsistence priority under Title VIII of the Alaska National Interest Lands Conservation Act (ANILCA). The Ketchikan Indian Community (hereinafter, KIC) posits that the Board's selection of information, interpretation of information, applicable laws and regulation was in error or contrary to existing law. Further, new information is now available regarding Ketchikan's economic situation which we urge the Board to review. Specifically, the Board's actions in question include maintaining Ketchikan as a nonrural community as well as grouping Pennock Island, parts of Gravina Island and the road system connected to Ketchikan. Further the Board's actions grouped Saxman with Ketchikan and changed Saxman's status from rural to nonrural. Because these actions significantly impact KIC, KIC is an aggrieved party under 50 C.F.R. §100.20 and therefore eligible to file this request for reconsideration with the Board.

KIC is a federally recognized tribal government formed pursuant to the Indian Reorganization Act. The Tribal Council represents a Tribe of 5,161 members, mostly of Tlingit, Haida, and Tsimpsian heritage.

See ARTICLE III, TRIBAL CONSITUTION (1939). KIC's mission is to provide for the general well being of all tribal members and beneficiaries through the various programs and services provided by the Tribe. See ARTICLE V, TRIBAL CONSITUTION (1939). To this end, KIC maintains a number of programs related to the traditional harvest and use of our subsistence foods and resources. Our way of life is essentially connected to the land, ocean, and the plants and animals that share this place with our Tribe. Hunting, fishing, and gathering provide KIC tribal citizens, as well as Ketchikan's non-Native population, with a protein and vitamin-rich source of food. It is critical to understand that in our way of life, reliance on subsistence foods and resources is not only a matter of health, but also a matter of economic necessity. Any number of factors, including great distance from other food sources and concomitant shipping prices, an unprecedented rise in fuel prices over the past few years, and decreasing living wages, make Ketchikan's Native and non-Native community physically and economically dependent on traditional subsistence resources.

It is also important to understand that 'subsistence' is a non-Native word, and it does not capture KIC's traditional way of life. The word subsistence often suggests poverty or bare survival. As testimonial given at Board meetings details, while subsistence is increasingly essential due to the economic downturn in Ketchikan, at its core, subsistence is a rich, vital, and fulfilling way of life. Subsistence gathering activities within Ketchikan build a network of social relationships and division of labor of harvesting, preparing, and distributing our wild foods. The spirit of sharing is central to a successful harvest, with both Natives and non-Natives sharing portions with extended family, Elders, widows, and others who cannot obtain their own supply. This way of life is central to Ketchikan's rural character, sense of community, and spiritual well-being. For this reason, among others, KIC runs a youth camp specifically designed to pass on our traditional harvest practices and values to the next generation. Prioritized access to subsistence foods and materials is necessary not only for survival, but will preserve the foundation of our culture and way of life.

KIC citizens rely heavily upon traditional foods as a source of healthy diet, healthy culture, and important supplement to the family's budget. Customary and traditional foods are about one-third higher in protein than high priced store-bought domesticated red meats, and the oils we use from fish and sea mammals are healthy and efficient sources of energy for a people residing in a cold northern marine climate. Ketchikan's wild foods are free of the pesticides, hormones, and chemical additives found in commercially processed foods. The customary and traditional subsistence foods are essential to the physical health of our people, and medical research indicates that changes away from the traditional subsistence diet is greatly responsible for the disturbingly high rate of diabetes, heart disease, obesity, and cancer among our people.

The traditional subsistence lifestyle is of critical physical, economic, social, cultural, and spiritual importance to KIC in particular, and the people of Ketchikan in general. For this reason, the Board's decision not to accord a subsistence priority to the Ketchikan area directly injures the physical, economic, social, cultural and spiritual welfare of KIC. The Board's decision places KIC's deep rooted values and needs in competition with commercial and sport interests, which are given equal value and footing. The Board's decision places our health, our economy and our way of life in direct danger. For this reason, KIC is an 'aggrieved party' eligible to submit this RFR. 50 CFR § 100.20 (b),(c)(3).

## **II. The Board's Interpretation of Information, Applicable Law, and Regulation Is In Error**

### **A. Title VIII of ANILCA Is Indian Legislation and Remedial Legislation, Subject to Canons Giving Broad Interpretation to its Mandate. The Board Interprets Title VIII of ANILCA Narrowly, Illegally Restricting KIC's Access to Subsistence Resources**



Congress was mindful of the inherent hunting and fishing rights of Alaska Natives and their importance to our way of life. Congress intended that after the Alaska Native Claims Settlement Act (ANCSA), the Secretary of the Interior and the State of Alaska would protect the subsistence needs of Alaska Natives:

The Conference Committee, after careful consideration, believes that all Native interests in subsistence resource lands can and will be protected by the Secretary [of the Interior] through exercise of his existing withdrawal authority . . . . The Conference Committee expects both the Secretary and the State [of Alaska] to take any action necessary to protect the subsistence needs of the Natives. Senate Report no. 581, 92<sup>nd</sup> Congress, first session 37 (1971). See 1971 USCCAN 5070, 5174-75.

Unfortunately, both the Secretary of the Interior and the State of Alaska failed to heed Congress and protect access to subsistence resources. In 1980, in a direct effort to remedy the lack of protection for the subsistence way of life, Congress passed Title VIII of the Alaska National Interest Lands Conservation Act (ANILCA), which states:

In order to fulfill the policies and purposes of the Alaska Native Claims Settlement Act and as a matter of equity, it is necessary for the Congress to invoke its constitutional authority of Native affairs and its constitutional authority under the property clause and the commerce clause to protect and provide the opportunity for continued subsistence uses on the public lands by Natives and non-Native rural residents. ANILCA, 16 USCA §§ 3111-3126, 3111 (subparagraph 4) (2006) (emphasis added).

When passing Title VIII of ANILCA Congress was primarily concerned for the Alaska Native traditional subsistence way of life, stating that “the continuation of the opportunity for subsistence uses . . . is essential to Native physical, economic, traditional, and cultural existence” and that

It is the intent of the bill in general, and the subsistence title in particular, so far as possible to allow the Alaska Native people to choose for themselves the direction and pace, if any, of the evolution of their own culture. See 16 USCA § 3111 [subparagraph 1]; 126 CONG. REC. 29, 279 (1980) (Statement of Representative Udall).

See *Native Village of Quinhagak v. United States*, 35 F.3d 388, 394 (9<sup>th</sup> Cir. 1994) (citing 16 U.S.C. § 3111(1) regarding “the clear congressional directive to protect the cultural aspects of subsistence living”); also *Williams v. Babbitt*, 115 F.3d 657, 666 (9<sup>th</sup> Cir. 1997); *United States v. Alexander*, 938 F.2d 942, 945 (9<sup>th</sup> Cir. 1991). Despite a poorly wrought political compromise to make subsistence a “rural” issue, it is important that the Board remember to what it owes its very existence. Congress reached for its constitutional authority over Native affairs to remedy a flaw in the Alaska Native Claims Settlement Act. There would be no federal subsistence program if not for the need to protect Native subsistence rights. The Board often cites to *dicta* in *Hoonah Indian Association v. Morrison*, 170 F.3d 1223 (9<sup>th</sup> Cir. 1999) (Analysis of Section 810 of ANILCA – Public Land Use Decisions) for the proposition that the canons of federal Indian law are not applicable to their rural determinations. However, KIC is compelled to remind the Federal Subsistence Board of the roots of ANILCA and the historical foundation for the subsistence priority. As discussed more thoroughly below, the Board has taken a narrow view of ANILCA. Beyond ANILCA as Indian legislation subject to liberal interpretation in favor of subsistence rights, Title VIII of ANILCA is clearly remedial legislation subject to canons of interpretation requiring the Board to take an expansive view of the subsistence priority. Remedial legislation seeks to “affect a remedy as distinguished from those [statutes] which affect or modify a

substantive right or duty". *Perkins v. Willamette Industries*, 542 P.2d 473, 475 n.1 (Oregon 1975); *see also Sekaquaptewa v. MacDonald*, 619 F2d 801, 808 n.6 (9<sup>th</sup> Cir. 1980) (remedial legislation is that legislation which creates a "private remedy for wrongs"). ANILCA is remedial because as discussed above regarding its legislative history, it was passed to remedy unlawful infringements on Native and non-Native subsistence rights in rural Alaska. As remedial legislation, ANILCA is entitled to liberal interpretation in order to effectuate its purpose. *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 504 (1999) (citing to *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967) for the proposition that "it has long been a 'familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes.'"). Instead of broad and liberal construction in favor of protecting access to subsistence resources, the Board interprets their mandate narrowly, and unduly restricts KIC and Ketchikan's rural resident's access to subsistence resources.

**B. The Board Failed to Accord Deference to the Recommendations of the Southeast Regional Advisory Council (SERAC) and Failed to Provide Written Findings to the SERAC In a Timely Fashion**

Section 805(c) of ANILCA requires deference to Regional Council recommendations regarding 'taking' of fish and wildlife on public lands. *See also* 50 CFR § 100.4 [Expansive definition of 'Taking']; 50 CFR §§ 100.10(e), 100.18(a)(4) [Requiring prompt written findings when not deferring to a Regional Council recommendation]. The Board's rural determination decisions directly impact a community's ability to undertake any subsistence hunting and fishing under Federal subsistence regulation. Without a rural classification, KIC and Ketchikan are forced to 'take' fish and wildlife pursuant to State of Alaska "sport" or "personal use" regulations. The Board's determination directly impacts KIC's and Ketchikan's taking of fish and wildlife, and unduly restricts our way of life to the confines of urban uses of fish and wildlife.

Much like Customary and Traditional use proposals, the C&T findings allow, or disallow the possibility that any subsistence 'taking' may occur. With this in mind, the Board must give deference to the Regional Advisory Council's authority to make recommendations regarding Ketchikan's rural determination. *See* ANILCA 805(c), 50 CFR §§ 100.10(e), 100.18(a)(4), and 100.11(c)(ix). The deference for the Regional Advisory Council stems directly to Congress' intent, expressed in ANILCA Section 801(5) "that an administrative structure be established for the purposes of enabling rural residents who have personal knowledge of local conditions and requirements to have a meaningful role in the management." (Emphasis added). The SERAC has the local knowledge that is vital to a proper understanding of the facts and application of criteria when making a determination for the community of Ketchikan. The local and regional advisory bodies are the rightful foundation of the federal subsistence management program.

Beginning in October of 2005, and concluding in October of 2006, the SERAC made recommendations that the Board make serious consideration of re-classifying Ketchikan as rural. The SERAC recommendations were based on the facts as presented by overwhelming testimony and more recent subsistence harvest data supporting a rural determination for the communities of Ketchikan and Saxman.

The Board's decision fails to accord deference to the SERAC, and the Board failed to provide timely written findings to the SERAC detailing why their recommendations were not supported by substantial evidence, violate recognized principles of fish and wildlife conservation, or would be detrimental to the satisfaction of subsistence needs. 50 CFR §§ 100.18.

### **III. The Board's Interpretation of Information and Data is In Error**

A community that has more than 2,500 people, may be classified as "rural" if the community "possesses significant characteristics of a rural nature (50 CFR § 100.15 and 36 CFR § 242.15). Recognizing that defining a rural community is not an easy task, the Board utilizes several factors that they *may* consider in making a rural determination including, but not limited to,: (i) use of fish and wildlife, (ii) development and diversity of the economy, (iii) community infrastructure, (iv) transportation, and (v) educational institutions (*Id.*) While these criteria may provide some semblance of objective decision points for a rural determination, the nature of a place is of equal importance. The legislative history of ANILCA explicitly states that the direction of economic development and rural character of a community is not static, and changes over time. U.S. Senate 1979: 223. When determining the nature of Ketchikan, the Board erred by failing to consider all of the new and relevant information presented since the last ANILCA classifications.

#### **A. Use of Fish and Wildlife**

In making its final rule, the Board found that "harvest of subsistence resources in the Ketchikan Area is lower than is characteristic of rural communities" 72 Fed. Reg. 25688, 25695 (May 7, 2005). KIC takes issue with this statement on a number of levels:

First, it is unclear what information the Board was actually using to make this finding. Beginning with the original non-rural classification in 1990, household subsistence use has not been historically collected, as funding and research was diverted to the original "rural" communities. In lieu of actual research and real information, the only information ever associated with Ketchikan came from ADF&G harvest ticket information for salmon and deer only. The 2000 ADF&G information estimated Ketchikan's 1990 subsistence per capita use at 33 pounds. In January 2006 the KIC received funding from the Bureau of Indians Affairs to conduct a survey of Ketchikan's Native and non-Native households. This survey, led by Dr. Dolly Garza, PhD. University of Alaska, and has been verified as being performed through accepted and established survey protocols. With a survey population of 242 families, The KIC study found per capita subsistence harvest in Ketchikan was 90.8 pounds - orders of magnitude greater than the earlier ADF&G estimate. See Executive Summary: Ketchikan Household Harvest Survey (Garza et. al., May 15, 2006). It is important to recognize that the new KIC survey did not include residents of Saxman, as at the time it was not grouped with Ketchikan for purposes of subsistence use. The survey also did not include residents of Ketchikan who live off the paved road system (Gravina Island for example). Further, a more accurate study needs to be performed with a two strata design to capture the major expert harvesters (most often from the tribal community) who represent a larger percentage of take, in order to distribute to others in the community. In short, Ketchikan's changing status over the years has been largely ignored by the Board and ADF&G. More accurate information is needed to discern the significant changes to Ketchikan since the 1990 classification. While some new information from the KIC study was presented to the Board, a careful review of the Board's decision-making transcript and final rule does not indicate that the updated data was considered at all by the Board.

Second, because Ketchikan has historically been designated an urban community, it is inappropriate to compare harvest levels in Ketchikan to that of rural areas. (See Decennial Review June 2006, largely adopted by the Board as its findings in the final rule). The surprisingly different harvest data derived in the KIC study begs the question: How many additional pounds of wild resources Ketchikan residents would use if able to harvest pursuant to the access provided by the federal subsistence regulations. Because Ketchikan has been confined in a regulatory box for the past 17 years, it is improper for the

Board to compare Ketchikan's subsistence use data to that of historically rural communities that are free to engage in the federal subsistence harvest. Even given Ketchikan's current restrictions under the State of Alaska's sport/personal use regulations, according to the KIC data use of fish and wildlife in Ketchikan is significantly higher than other urban communities as well as some rural communities including Skagway (48 pounds per capita); Metlakatla (70 pounds per capita) and has similar harvest rates as numerous rural communities in South-central Alaska including Talkeetna, Trapper Creek, Cooper Landing, Gulkana and Glennallen which all have per capita harvest rates of less than 100 pounds.

Third, subsistence use in Ketchikan has been increasing in response to harder economic times with the closure of the Pulp Mill and its stream of steady employment. The 2000 ADF&G estimate of 33 pounds was for salmon and deer use in 1990. Using the this same data set in the KIC study, salmon and deer only, current use of these resources is 73 pounds - more than double use of fifteen years ago. With the economic downturn in Ketchikan, both Native and non-Native families are becoming increasingly reliant on fish and wildlife resources for significant percentages of their protein intake.

Lastly, on the one hand the Board has chosen to group Ketchikan with Saxman and the outlying areas, yet the data related to fish and wildlife use fails to take into account use by these previously rural designated communities. The Board has recognized that use of subsistence resources by Saxman residents (217 pounds per capita) is much greater than that of Ketchikan as well as most other rural communities. We strongly support Saxman's position that the Board erred in aggregating Saxman and Ketchikan together. Regardless, the Board can not have it both ways. If the Board is to aggregate the communities, then it must consider the use of fish and wildlife resources aggregately using both the quantitative values (adjusted overall use to include the high use of resources by Saxman residents) as well as the qualitative importance of such activities to the Saxman community. The Board failed to recognize this changed and enhanced use of subsistence resources in its rule, instead choosing the vague and unfounded statement "Harvest of subsistence resources in the Ketchikan area is lower than is characteristic of rural communities."

Subsistence foods play an especially important role in meeting protein demands of local residents. Wild foods are also healthy and natural promoting better physical well being than many store bought processed foods, an important issue for a community facing health concerns such as diabetes and obesity. More than 80% of households Ketchikan households surveyed use at least one wild resource totaling more than 1 million pounds of fish and wildlife each year. (KIC Harvest Survey 2006) Compelling public testimony was presented to the Board indicated that an increasing reliance on subsistence foods was in part due to the decline in the cash economy. Should Ketchikan be properly reclassified as rural, consumption of traditional foods will increase, and in exchange, less healthy and expensive processed store bought food will decline. The Board erred in finding that use of subsistence resources in Ketchikan is indicative of an urban community.

## **B. Development and Diversity of the Economy**

As previously stated, the rural character of a community is not static, and is subject to change over time. Nowhere is this more true than with the community of Ketchikan. The Board failed to properly consider the changing economic conditions of Ketchikan in its final rule. Ketchikan's original non-rural determination was made at the height of the logging and wood products industry in Southeast Alaska, and the direction of this community was to be urban. However, the timber industry has diminished substantially, especially in Ketchikan. In its decision, the Board significantly underestimated the impact of the closure of the pulp mill and its impact on the health of the Ketchikan economy. In fact the Board

deliberations show that at least some board members were under the false impression that Ketchikan's economy is more diverse than that of Kodiak and is "not going backwards"(See Statements of Denny Bschor 12/13/06 Board meeting). Further, the Board in making its finding basically dismissed the closure of the pulp mill stating, "Although the pulp mill closed, there is still diversity in the economy" including tourism, fishing and fish processing 72 Fed. Reg. 25695 (May 7, 2007). Given the serious implications of the mill closure and the challenges with the tourism and seafood industry detailed below, the Board's decision is unsupported by the actual facts.

Ketchikan was the center for industrial logging at the time ANILCA was passed. The Ketchikan Pulp Corporation (KPC) Mill was constructed in Ward Cove in 1954. For close to fifty years the KPC mill and a similar mill in Sitka drove the federal timber program on the Tongass National Forest and employed a significant number of full-time well paying jobs in the communities. The Sitka mill closed in 1993 and the KPC mill closed down in March 1997 bringing pulp production in the region to an end. According to the U.S. Forest Service direct employment in the wood products industry declined dramatically from its peak of 3,543 jobs in 1990 to 450 jobs in 2004. Much of this job loss was associated with the closure of the Sitka and Ketchikan mills which together accounted for 899 jobs in 1990 (USFS 2007).

Closure of the KPC mill, Ketchikan's largest employer, resulted in the direct loss of 516 jobs, many of which were high paying, year round benefited jobs. The KPC closure did not only impact those directly working at the mill but had a domino effect on the regional demand for timber, the market for wood chips, and in turn jobs at sawmills and in the logging sector (Alaska Trends 2001). While employment in the wood products sector declined in all boroughs during the 1990s, the largest loss was felt in the Ketchikan Gateway Borough which lost 1,046 jobs (USFS 2007). Ketchikan has also lost many of the Federal government jobs that managed timber harvest in the Tongass National Forest; these jobs are typically not factored into calculations of job loss in the wood products industry. Further, this decline has not ended as "employment decreases tend to lag behind decreases in production, and further declines in employment levels are possible even if there are no further changes in [timber] harvest levels" (Id.). Lastly, the loss of the mill and its associated jobs has meant a significant decline in Ketchikan's tax base, a rise in rental unit vacancy and a decline in real-estate sales (Alaska Economic Trends 2001.)

Ketchikan thought it would see its wood products industry revived a few years back when Gateway Forest Products lumber and veneer facilities opened on the former site of the KPC Pulp Mill in Ward Cove. However, the hope was quickly diminished when Gateway Forest Products filed for bankruptcy protection in February 2002. The sawmill was sold and dismantled shortly thereafter.

It is clear the closure of the KPC pulp mill and the trickle down effect this closure had on the larger wood products industry in Ketchikan was a substantial impact to the community resulting in the loss of good paying benefited jobs that have not been replaced. Between 1996 and 1999 Ketchikan's employment declined by 7% compared to a flat Southeast regional change and a 5.3% statewide change (Alaska Economic Trends 2001). It is not just employment numbers that have changed, but wages as well. Prior to the closure of the KPC mill, Ketchikan wages were on average \$160 more than the Southeast regional average. Yet, after the mill closure Ketchikan's monthly wages dropped below the statewide average and are now comparable with the average wage for the Southeast Alaska region (Alaska Economic Trends 2001.)

The U.S. Department of Commerce, Bureau of Economic Analysis compiled data showing total full and part-time employment (including proprietors and self-employed workers) by borough for 1990 and 2000. These data indicate that overall employment in Southeast Alaska increased by approximately 11

percent during the 1990s, with population increasing by 6 percent over the same period. It also shows that employment increased in all boroughs with the exception of Ketchikan Gateway, which experienced a net loss of 529 jobs or 4.9 percent of total employment over this period. This decline includes a -73.2 % change in wood products jobs. In comparison total employment in Juneau increased by 4,036 jobs or 22 percent and in Haines by 31 percent or 520 jobs. Further, Ketchikan's per capita income while not the lowest in the State, is far below many currently designated rural communities including the Aleutians, Bethel, Dillingham and Haines. Further, rental costs in Ketchikan are higher than state and national averages (Community Assessment 2007).

Rather than looking at the hard data above, in making its findings that Board appears to be taking a snapshot of Ketchikan's economy by looking only at unemployment rate from 2000 rather than changes over the past ten years. In 2000 approximately 7 percent of the labor force in Ketchikan was identified as unemployed and seeking work, this is comparable for Southeast Alaska as a whole. While we understand the Board was using 2000 census data, this does not give the Board a full picture of changes to the community since the 1990 review. In fact on average Ketchikan's annual unemployment rate between 1991 and 2003 (8.4%) is higher than the statewide average of 7.5% (Alaska Department of Labor) and has fluctuated between 7.0% and 10.2% from 1991 to 2003. Given that the vast majority of Southeast Alaska communities, with the exception of Juneau, are currently designated as rural, Ketchikan's above average unemployment rate over the past ten years should be taken into account in determining the health of its economy. While the Board was aware that the pulp mill closure had some impact on Ketchikan's economy, the record indicates that the Board felt the changes felt by Ketchikan in the past 17 years are not "compelling".

In making its determination that Ketchikan's economy is healthy and diverse the Board in part relied on the growth of the tourism industry. While the tourism industry has grown, it is critical to recognize that a large percentage of the owners and employed in the tourism industry are not Ketchikan residents, and a great deal of the wages and income earned return to the Lower 48 states when the Summer season ends. 83% of Alaska's tourists come over the summer months resulting in seasonal employment only (*Id.*) While urban areas, such as Juneau and Anchorage see some seasonal variation in work force on average of 12%, Ketchikan's seasonal fluctuation was much greater at an estimated 31% during 2005 (2,500 jobs) (Community Assessment 2007.) This seasonal fluctuation has grown from 26% in 1997 to 31% in 2005 and is seen as a root cause of many of Ketchikan's social ills (*Id.*) Tourism jobs also pay significantly less than full-time benefited year round jobs at the mill did. Tourism is also estimated to be declining with 100,000 fewer tourists expected to have visited in 2006 than in 2005 (OSM 2006). Lastly, the changes tourism has brought have in many ways created a more rural feel to our community in all months but summer. A visitor to Ketchikan on an average winter day will find many buildings and stores boarded up for the season and downtown feeling much more like a small deserted ghost town than a vibrant urban center. In sum, while tourism is important to Ketchikan's economy it has not replaced the more than 500 well paying, benefited year round jobs lost since the last rural review in 1990. While the Board was given some very general indication that tourism jobs are seasonal and do not pay as well as the lost mill jobs, the significance of the limitations of tourism on the economy were not presented to the Board by the staff prior to making their determination.

Second, the Board's findings point to fishing as a support of a healthy economy in Ketchikan. While we do not dispute the importance of fishing to the community, the Board again failed to look at the whole picture. Specifically, the Board did not consider that the worldwide growth in farmed salmon, and an oversupply of wild salmon, has resulted in significant declines in salmon prices - seriously hurting local fisherman and the Ketchikan economy as a whole. This correlates with the fact that the number of commercial permits held and fished by Ketchikan residents has declined since the 1980s (Alaska

Economic Trends 2001). In 1982, Ketchikan residents held 392 commercial fishing permits. This number declined to 334 in 1990 and declined further to only 252 permits in 1999 (Id.) The earnings of commercial fisherman in Ketchikan have also declined since the last rural review, dropping from \$23 million in 1989 to only \$11 million in 1999 (Id.) A further decline in seafood related jobs is forecast for Alaska's in the near future (Community Development Assessment 2004). In our review of the record, none of this information was presented to the Board prior to them making their determination.

In sum Ketchikan experienced a -4.8 percent loss of total employment from 1997 to 2005. This economic downturn has also resulted in a loss of population and school enrollment over the past five years. In contrast, urban areas of the State, such as Juneau and Anchorage, experienced growth during this time (Community Assessment 2007). There is concern both that employers are unable to find trained and qualified professional employees and that children are leaving the community as they grow up to move to urban centers such as Juneau and Anchorage where more job opportunities exist for unskilled laborers. Twenty nine percent of the Ketchikan households recently surveyed responded that they were concerned with finding a good job, affording health insurance and housing, and paying for heating and utilities (Id.)

The hard data discussed above is supported by the written and oral testimony presented to the Board from Ketchikan and Saxman residents regarding the economic struggles many in our community are facing. Further, new information now exists that also validates the fact that our community is not healthy and diverse as the Board claims.

In January 2007, United Way of Southeast Alaska released the Ketchikan-Saxman Compass II Community Building Assessment. The Assessment took into account the entire Ketchikan Gateway Borough. Among the projects goals was to identify issues that are important to the community. The report analyzed information gathered from a wide range of sources including surveys, executive interviews, focus group discussions, and secondary socio-economic research. Collected information was also extensively reviewed by the McDowell Group research team, a local Ketchikan - based Steering Committee of local leaders, and by United Way staff and volunteers.

Among the themes identified by the study was the fact that Ketchikan is having an "economic identity crisis" and that "a diverse year - round economy [is needed] in order to thrive and resolve many of its social ills." Specifically, the report recognized the impact the pulp mill closure has had on the town's economy and that numerous problems are posed by the seasonality of employment (including high unemployment rates in the winter) (Community Assessment 2007). The study clearly showed, despite a general growth in tourism over recent years, there is still a long way to go to developing a stable and prosperous economic base in Ketchikan" (Id.)

The Compass II Assessment also found poverty was a serious concern for Ketchikan:

Poverty remains a root cause of many community problems, exacerbating other issues and leading to intractable situations ... many households in the Ketchikan area are economically fragile, and consequently, the quality of life for many residents is diminished. Seven of the top ten household concerns in Ketchikan revolve around finances and money, with a concern for medical care topping the list. For low-income and other families, there is a lack of affordable housing options, and for unskilled laborers, there is a lack of well-paying job opportunities to help rise out of poverty.



In the household surveys conducted for the assessment, respondents were asked to identify the greatest single unmet need in the community; lack of jobs/the economy was identified as the most significant unmet need (two out of ten households or 20 percent of respondents listed this first). Similarly, respondents were asked "If you were to hope for one thing new or different about the community of Ketchikan in the next ten years what would it be?" The number one answer (18% of respondents) replied that more jobs/stability was there greatest hope.

The United Way report provides important comprehensive community information available that should be reviewed by the Board. The report's findings support the data presented above as well as the written and oral testimony provided to the Board that Ketchikan's economy is struggling. The result is an increasing reliance on subsistence foods in part due to the decline of the cash economy. Further, the economic changes in Ketchikan prompted the SERAC as well as other regional RACs to request reconsideration by the Board of Ketchikan's status. By ignoring the clear economic data and community testimony the Board has failed to recognize that Ketchikan economy has experience significant changes since 1990, clearly exhibiting rural characteristics.

### **C. Transportation**

In its final rule, the Board found that "roads linking the outlying surrounding area to the city" and that "ferry service is more dependable with greater frequency of service than in most other locations in Alaska" contributed to Ketchikan's designation as non-rural. 72 Fed. Reg. 25695 (May 7, 2007). The Board failed to truly consider that despite the existing small road system, Ketchikan has limited transportation options and most importantly, the road system does not connect to any other communities. Access in and out of Ketchikan for people as well as commodities including commercially processed food, is by ferry, plane or private boat. While we do receive daily jet service, the Board failed to recognize that the severe weather of Ketchikan often results in cancelled and delayed flights during large portions of the year and that therefore transportation off the island can not be guaranteed on any given day. Similarly, the Alaska marine highway system has experienced significant problems in recent years, including numerous mechanical problems resulting in cancelled and delayed sailings, as well as continual budget shortfalls making the ferry schedule uncertain from one year to the next. The bottom line is, unlike urban residents who can drive to receive necessary medical care and buy goods, Ketchikan residents, like other rural residents of the state, are limited to expensive and unreliable transportation options for these needs. The costs and difficulties presented by Ketchikan's transportation options are exacerbated further by the tripling of fuel prices over the past few years. When this incredible increase in cost is combined with the loss of employment and strength of wages, Ketchikan residents must seek to supplement their household tables with subsistence resources that locally and more reasonably available.

### **D. Community Infrastructure**

In making its findings the Board points to the presence of a large national retailer (Wal-Mart) as an indicator that Ketchikan is nonrural. What the Board has failed to consider is that while the presence of one such store has driven out some local businesses, the large store has no other large stores to compete with and therefore our food and goods prices remain relatively high. Further, rural communities, such as Kodiak, also possess a large national retailer. The presence of such stores is only relevant to the extent that food prices significantly decline. Given that all goods must be shipped to our island community, our shipping costs result in high commodities regardless of the existence of Wal-Mart. Further, the existence of one store is very different than that of other urban communities such as Anchorage which have many such stores, providing consumers with choices and competitive pricing.



The Board also points to the existence of a car dealership and fast food restaurants as indicative of nonrural status. While we do not dispute the existence of these facilities, they also exist within many other rural communities throughout the State. KIC fails to understand how these factors can be construed as indicative of a non-rural Ketchikan, while they are basically overlooked in other similarly situated rural communities. This approach is an arbitrary and capricious methodology for deciding that some communities are rural, while others that are similarly situated, are inexplicably non-rural.

While on paper it may appear that Ketchikan has diverse services, the reality is that like rural communities throughout Alaska, there are many gaps in certain types of skilled and professional labor available in Ketchikan, resulting in the need for residents to travel at great expense outside the community for certain medical or other professional help.

The closest large communities of Juneau and Seattle are quite a distance away and relatively expensive to travel to. For this reason members of KIC must purchase their food locally or hunt, fish or gather them through subsistence activities. While residents do purchase a portion of their food in town, the cost is significantly higher than many urban communities elsewhere in Alaska and food quality, quantity, and availability are often limited at Ketchikan stores. Similarly, housing, fuel, and food costs in Ketchikan are quite high and to supplement store-bought food with what we can hunt, fish, and gather from the land is invaluable. The 224.5 pounds of wild food harvested by the average Ketchikan household is critical to offsetting the high cost of buying food at the grocery store (KIC Harvest Survey 2006.)

Food, gasoline, fuel and utilities (with the exception of locally generated electricity) cost more in Ketchikan than the national average as well as more than in urban Juneau or Anchorage (Community Assessment 2007.) Heating oil and gas costs have increased significantly in recent years and are expected to continue to do so. Further, lack of affordable medical insurance has been identified as a significant community concern. (*Id.*) Despite these documented changes and concerns, the Board failed to consider these changes when deciding to leave Ketchikan's rural status unchanged.

### **E. Educational Institutions**

In making its finding to keep Ketchikan as nonrural, the Board relied upon the fact that Ketchikan has a 2-year college. Many other communities currently designated as rural also possess these same services. For example, the University of Alaska maintains 19 campuses throughout Alaska, many of which are located in currently designated rural communities. If the Board looked beyond the existence of the small University campus in Ketchikan, they would have seen that the percentage of residents with bachelor's and graduate/professional degrees in Ketchikan is lower than the statewide and national averages (Community Assessment 2007). Further, public school enrollment has declined since the closure of the KPC pulp mill dropping from 2,872 in 1997 to 2,325 in 2005 (*Id.*) Rather than looking beyond the surface, the Board prefers a stilted and arbitrary view of the existence of a 2-year college in our community.

### **Summary:**

The data shows that Ketchikan exhibits the characteristics of a rural community and therefore should be treated so. The recently held Board hearing in Ketchikan as well as written testimony only further strengthens this finding. The bottom line is that subsistence hunting, fishing and gathering is time consuming and hard work. It is not a luxury, but an important part of people's spiritual and physical well being. KIC strongly believes that the Board has erred in finding Ketchikan does not possess the

characteristics of a rural community. Access to subsistence resources under State regulation does not meet the needs of Ketchikan's residents today or in the future.

#### **IV. The Board Actions were Arbitrary and Capricious as the Application of the Rural Criteria Are Not Being Uniformly Applied to Communities Across Alaska.**

As explained above the Board has five criteria which it may consider in making rural determinations. Additionally, as each Alaskan community is different, the Board is to look at other characteristics it deems relevant in making its decisions. While we appreciate the Board's ability to look to each community's uniqueness, the Board has failed to apply its criteria in a consistent and lawful manner<sup>1</sup>. We believe a comparison between the Board's actions in relation to Ketchikan and Kodiak best demonstrates our concern. However, before doing so we would like to clearly state for the record that KIC strongly supports the finding that Kodiak is a rural community. Our purpose here is solely to demonstrate that the two communities possess very similar characteristics of a rural nature and that the Board's actions in finding one rural and the other nonrural are unclear and indefensible.

The communities of Ketchikan and Kodiak exhibit many of the same characteristics including population and community infrastructure. In 2005 the population of Ketchikan was estimated at 12,720 (excluding Saxman) while Kodiak's population was 12,816. Between 1990 and 2004 the population of Kodiak grew 5.1%. In contrast during this time Ketchikan's population declined by -3.2%. Both communities are on isolated islands with no road connection off the island and therefore travel from either community to the nearest large city is expensive and inconvenient. Although both communities have no outside road connection Kodiak does have significantly more road miles (140) than Ketchikan's limited and small road system.

Ketchikan and Kodiak both have a rural feel as they are largely surrounded by public lands used for hunting, fishing, recreation and other activities. It is the existence of such lands that in many ways limit possibilities for future growth. Both communities have a diversity of stores (including one large national retailer each) as well as fast food restaurants and car dealerships. Both communities have city water and sewage treatment systems. Both communities have similar entertainment options including a pool and movie theatre. Kodiak also has a bowling alley, bingo hall and teen center as well as numerous and diverse recreation facilities at the Coast Guard station. Ketchikan and Kodiak also have similar educational opportunities with one high school and a University of Alaska campus each.

In making findings, at least one Board member, Mr. Denny Bschor, stated his belief that Ketchikan's economy is more diverse than Kodiak. However the facts do not support this finding. Ketchikan and Kodiak also have similar economic conditions. The communities have a similar 2000 census per capita income with Kodiak at \$22,195 and Ketchikan slightly higher at \$24,290. At the same time Ketchikan's 2000 unemployment rate at (7.0%) is greater than that of Kodiak's (4.3%). The cost of food index is close for both communities with Kodiak's costs at \$130-slightly higher than Ketchikan's \$120.

Kodiak's subsistence use is relatively high, yet the level of use has changed little over the years. While little accurate historical data exists for Ketchikan's use of fish and wildlife resources, public testimony, the recent KIC Household Harvest study as well as ADF&G data for salmon and deer, show a significant increase in the use of fish and wildlife resources over the past 17 years. In fact both

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<sup>1</sup> It is our understanding that concern over lack of consistency in decision making led the Board to contract the University of Alaska Institute for Social and Economic Research in 2001 to prepare a report to help the Board identify options for incorporating a more standardized methodology in making its rural determinations. The report was completed in 2003, yet it is unclear why no new methodologies suggested in the report have been adopted by the Board to date.

communities use the same amount of these two resources (73 pounds) as indicated by the recent KIC study.

Despite the fact that Ketchikan and Kodiak have many similar traits, the Board looked at each trait in a different light, and strangely enough, made a finding that Kodiak possesses significant characteristics of a rural nature and Ketchikan did not. The Board used inconsistent reasoning in reaching this conclusion.

First, in Ketchikan's situation the Board pointed to the fact that Ketchikan has the state's 6<sup>th</sup> largest population in the State making it nonrural. However, in 2005 the population of Kodiak was actually larger than that of Ketchikan by just under 100 people. So population is clearly not a basis in which to delineate the communities. Further problems with using population as a defining characteristic of a rural community are outlined below.

Second, the Board points to a well attended public hearing with 85 testimonies presented in unanimous support for maintaining Kodiak's rural status. While we do not disagree that the Kodiak community has shown strong community support during the review process (nor do we disagree that Kodiak is in fact rural); we do not see this community support as any different than that shown from Ketchikan. In its deliberations the interagency staff found that the "Board public hearing in Kodiak regarding rural status was well attended by a large, diverse group of people, all of whom presented testimony that elaborated on the rural nature of Kodiak" (FSB Staff Report 12/ 2006). In contrast to Kodiak, the Interagency Staff Report (12/2006) as well as Board deliberations state that public testimony for Ketchikan did not make a "compelling case" for a change in Ketchikan's rural status. This Jekyll / Hyde approach demands further analysis.

During the September 2006 public meeting held by the Board in Ketchikan, 33 people testified in support of redefining Ketchikan from an urban to a rural community. No-one testified against this change. An additional 28 people testified during the Saxman public hearing entirely in support of maintaining Saxman's rural status. Similarly, the Board received 72 written comments during the public comment period also favoring rural status for Ketchikan for these same reasons. From public officials, Elders, the very young and everyone in between, the residents of Ketchikan and Saxman spoke with a unanimous voice that subsistence is an integral part of our communities' culture and heritage as well of extreme importance to our economically challenged situation. Much of the testimony was focused on the many changes in our community since 1990. None spoke more eloquently about the importance subsistence plays in upholding the traditional ways than the Native peoples of this area. Many Native elders testified about the importance of collecting and sharing wild foods among family and friends and passing on the traditions of subsistence hunting, fishing and gathering to the youth. Others focused on the immeasurable health benefits of subsistence gathered foods compared to those purchased in local stores. In the end there was no doubt as to the importance that cultural and traditional foods serve for Ketchikan residents both historically as well as today. It was also clear from public testimony that Ketchikan residents feel strongly that our community exhibits characteristics of a rural community and that much has changed, particularly in relation to Ketchikan's economic decline since the 1990 Board review designated Ketchikan a nonrural community.

Further, support for Ketchikan's rural status came from numerous organizations including the Alaska Federation of Natives (AFN), Alaska Native Brotherhood and Alaska Native Sisterhood, Grand Camp, Kuiu Tlingit Nation. Further, The SE Regional Advisory Board has been strongly in support of designating Ketchikan as a rural community since the inception of this decennial review.

In sum, support for Ketchikan to be redefined as a rural community came from a large diverse group. Further, voluminous written testimony supported this recommendation. Despite these facts, the Board somehow found the testimony in favor of Kodiak to be "compelling", and testimony in favor of Ketchikan not "compelling". Without any findings to distinguish the public outpouring in favor of rural status for both communities, the Board's disparate treatment is arbitrary and capricious.

Third, the Board found that Ketchikan has a more diverse and healthy economy than Kodiak. In making this finding the Board appears to be picking and choosing data from the years that best meet its seemingly pre-determined result. For example, according to the 2000 census data unemployment in Ketchikan was at 7.0% while Kodiak's unemployment rate was significantly lower at 4.3%. Both communities have had large fluctuations in employment both between seasons and between years. However, in presenting information to the Board in its Rural Decennial Review June 2006, in the case of Kodiak these fluctuations were recognized and the highest unemployment rate (9.7% in 2004) was presented. In contrast when discussing Ketchikan the staff only discusses the 2000 unemployment rate-failing to recognize Ketchikan's unemployment rate on average between 1991 and 2003 was 8.4%, jumping as high as 10.2% at times since the last review. Further, in the case of Kodiak, the Board specifically recognized the impacts that a downward trend in value of commercial fisheries is having on Kodiak. Despite listing commercial fishing as one of the reasons Ketchikan's economy has been found diverse, no recognition of the downward trend in the value of commercial fisheries was made for Ketchikan.

Ketchikan and Kodiak can not be differentiated based on population, community infrastructure or economics. While there is some level of difference in the use of subsistence resources, this difference is mitigated by the more recent KIC Household Survey which triples the numbers previously estimated for Ketchikan, and that use is growing due to the economic downturn of Ketchikan. Further, as previously discussed, Ketchikan's harvest of subsistence resources is confined to a regulatory box by the non-rural determination in 1990.

The record clearly shows that the Board's decision to maintain Ketchikan's non-rural classification is due in large part to the fact that Ketchikan has been considered non-rural since the inception of the Federal Subsistence Management Program. (See FSB Staff Report 12/2006). This reasoning is erroneous as it freezes a community in time, and disregards that same legislative history's statement that a community's rural status is not static, and does indeed change over time. The Board's decision fails to truly consider the rural characteristics displayed by Ketchikan today. The purpose of the decennial review is to consider these determinations with an emphasis on what has changed in the last 10 years (See Decennial Review FSB June 2006). That means the Board's task was to focus on what has changed in Ketchikan since the non-rural determination was made by the Board in 1990. Evidence was demonstrated through empirical data as well as overwhelming public testimony to demonstrate that significant changes have occurred in Ketchikan since 1990 to present and that a change in Ketchikan's rural status is warranted. However, the Board's decision seems entranced with the past, and maintaining Ketchikan at its 1990 determination.

Again, the purpose of this analysis was not to undermine the rural determination of Kodiak or any other medium-sized community displaying rural characteristics. The purpose of this analysis was solely to illustrate how the Board looked at nearly identical characteristics in the two communities, but came up with inconsistent and arbitrarily different conclusions.

**V. The Board Improperly Relied on Population Figures When Making Its Determination**

As has been detailed to the Board by the SERAC, the setting of the 7,000 population figure for rural determinations was in error. While Ketchikan City was mentioned in legislative history as the smallest "non-rural community" with a population of around 7,000, the truth is, the "Ketchikan Area" as it has become known had a population of 11,316 in 1980 (excluding Saxman's population of 273). While this error was brought to the Board's attention in 1990, because no other community was impacted by this counting error, there was no further public demand to change the regulation setting a population threshold.

In making its findings the Board relied upon the fact that Ketchikan has the 6<sup>th</sup> largest population in the state and that all areas with higher populations are currently considered non-rural. 72 Fed. Reg. 25695 (May 7, 2007). Further, the Board pointed to the fact that several communities with populations smaller than Ketchikan are also designated nonrural (*Id.*) The Board fails to point out the major difference between these communities (Homer, Seward and Valdez) is that they are connected via a road system to Anchorage where an abundance of diverse economic and social services exist. Ketchikan does not have this luxury as it is on an isolated island. Ketchikan is only reachable by air or water. The Board also failed to recognize that despite Ketchikan being Alaska's 6<sup>th</sup> largest city it still only holds approximately 2% of Alaska's population. Further, according to the 2005 census data the population of Kodiak is slightly above that of Ketchikan, making Ketchikan the 7<sup>th</sup> largest population in the State (with its population declining).

It is clear that at the time ANILCA was passed, Ketchikan was a community on the rise; however data from recent years has shown this is no longer the case. Between 2000 and 2005, the population decreased by a 7 percent (919 residents). Ketchikan Gateway Borough experienced the largest absolute net out-migration of all Southeast Alaska boroughs over this period. Ketchikan had an average out-migration of 11.5 persons per year per 1,000 population from 1991 to 2003 (Alaska Department of Labor). In concert with this out-migration, the Ketchikan School District lost approximately 500 students. Ketchikan's declining population is inconsistent with that of the population of Alaska as a whole of and or the urban centers of Anchorage, Juneau and Fairbanks which have seen significantly population increases.

Further, Ketchikan is undoubtedly rural when compared to rest of the United States. Ketchikan's population density is a mere 2.43 per square mile (OSM 2006). According to the USDA's Rural Information Center, there three most common definitions of rural, and all three are less restrictive than the threshold populations used by the Board. *See* USDA Website (Three most common federal definitions of rural are based on a population density of at least 500 people per square mile, proximity to a metropolitan area of 50,000 or more people, and a combination of these two definitions).

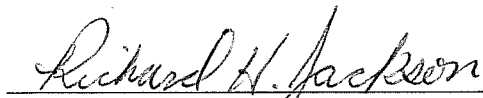
As discussed above, with the economic downturn of Ketchikan, and the rising fuel costs affecting transportation, Ketchikan's population is more isolated geographically and economically than ever before.

**VI. CONCLUSION**

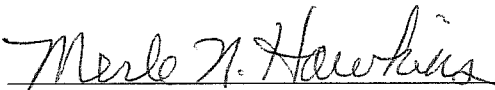
Based on the points raised above, the Board should reconsider and reverse its May 7, 2007 decision to aggregate Saxman with the Ketchikan Area, and to classify the Ketchikan Area as Non-Rural. At best, the Board should reconsider the information provided by testimony and in this RFR, and should determine the Ketchikan Area to be rural, thus extending the federal subsistence program in a way that

protects and promotes "the continuation of the opportunity for subsistence uses" by rural Native and non-Native harvesters. At worse, the Board should properly digest the new information presented in the 2006 Ketchikan Household Survey and the 2007 United Way Study. Additional analysis should be done, including examination of segments of the Ketchikan population (particularly the tribal population) that show significant characteristics above the average. Further, analysis should be performed to determine whether these harvests are reflecting an increasing trend because of the crash of the timber industry and resultant economic downturn in Ketchikan. Again, ANILCA itself contemplates the fact that the status of a community is not fixed forever. The social and economic changes within Ketchikan since 1990 warrant serious consideration, not just a window dressing to keep the status quo. The Board should accord deference to the SERAC and reconsider its decision to classify Ketchikan as non-rural and interpret its mandate under Title VIII of ANILCA in a broad and remedial manner to effectuate Congress' purpose of protecting access to subsistence resources.

With Respect and Esteem



Richard Jackson, Tribal Council President  
Ketchikan Indian Community



Merle N. Hawkins, Tribal Council Secretary  
Ketchikan Indian Community

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**APPENDIX B:** Federal subsistence management program regulatory language regarding requests for reconsideration.

Subsistence management regulations at 36 CFR Part 242 and 50 CFR Part 100, state the following regarding requests for reconsideration.

§ \_\_\_\_\_.20 *Request for reconsideration.*

- (a) Regulations in subparts C and D of this part published in the Federal Register are subject to requests for reconsideration.*
- (b) Any aggrieved person may file a request for reconsideration with the Board.*
- (c) To file a request for reconsideration, you must notify the Board in writing within sixty (60) days of the effective date or date of publication of the notice, whichever is earlier, for which reconsideration is requested.*
- (d) It is your responsibility to provide the Board with sufficient narrative evidence and argument to show why the action by the Board should be reconsidered. The Board will accept a request for reconsideration only if it is based upon information not previously considered by the Board, demonstrates that the existing information used by the Board is incorrect, or demonstrates that the Board's interpretation of information, applicable law, or regulation is in error or contrary to existing law. You must include the following information in your request for reconsideration:*
  - (1) Your name, and mailing address;*
  - (2) The action which you request be reconsidered and the date of Federal Register publication of that action;*
  - (3) A detailed statement of how you are adversely affected by the action;*
  - (4) A detailed statement of the facts of the dispute, the issues raised by the request, and specific references to any law, regulation, or policy that you believe to be violated and your reason for such allegation;*
  - (5) A statement of how you would like the action changed.*
- (e) Upon receipt of a request for reconsideration, the Board shall transmit a copy of such request to any appropriate Regional Council and the Alaska Department of Fish and Game (ADFG) for review and recommendation. The Board shall consider any Regional Council and ADFG recommendations in making a final decision.*
- (f) If the request is justified, the Board shall implement a final decision on a request for reconsideration after compliance with 5 U.S.C. 551–559 (APA).*
- (g) If the request is denied, the decision of the Board represents the final administrative action.*